

# LSU Journal of Energy Law and Resources

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Volume 9  
Issue 1 *Winter 2021*

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3-26-2021

## Cleaning Up the Past: Abuse of the Citizen Suit Provision in Order to Circumvent the Prescriptive Period of Legacy Litigation

Ashleigh Adams

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### Repository Citation

Ashleigh Adams, *Cleaning Up the Past: Abuse of the Citizen Suit Provision in Order to Circumvent the Prescriptive Period of Legacy Litigation*, 9 LSU J. of Energy L. & Resources (2021)  
Available at: <https://digitalcommons.law.lsu.edu/jelr/vol9/iss1/10>

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# **Cleaning Up the Past: Abuse of the Citizen Suit Provision in Order to Circumvent the Prescriptive Period of Legacy Litigation**

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## INTRODUCTION

There is a famous saying, “[i]f at first you don’t succeed, try, try, again.”<sup>1</sup> Recently, Louisiana landowners are taking this saying to heart.<sup>2</sup> After having their legacy litigation<sup>3</sup> claims denied by the courts, plaintiffs have engineered a clever new tactic to resuscitate their claims: the citizen suit.

Louisiana has a long-held, strong public interest in protecting against environmental damage, which is reflected in the Louisiana Constitution.<sup>4</sup> The Louisiana Constitution specifically states that the environment must be “protected, conserved, and replenished insofar as possible and consistent with the health, safety, and welfare of the people.”<sup>5</sup> Pursuant to this policy, the legislature is required to set up procedures to protect the environment.<sup>6</sup> For this reason, the legislature has attempted to regulate and protect the environment from the damaging effects of oil and gas exploratory operations by implementing what are known as “citizen suit provisions.”<sup>7</sup>

In 1940, the Louisiana State Legislature passed Act No. 157 in order to regulate and promote the conservation of Louisiana’s gas and other

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1. GREGORY Y. TITELMAN, RANDOM HOUSE DICTIONARY OF POPULAR PROVERBS AND SAYINGS 151 (2nd ed. 1996).

2. *Guilbeau v. BEPCO, L.P.*, No. 1:18-cv-551, 2019 WL 3801647 (W.D. La. Aug. 12, 2019); *Tureau v. BEPCO, L.P.*, 404 F. Supp. 3d 993 (W.D. La. Aug. 12, 2019); *Global Marketing Sols. v. Blue Mill Farms*, 267 So. 3d 96 (La. Ct. App. 1st Cir. 2018); *Watson v. Arkoma Dev., L.L.C.*, No. 17-1331, 2018 WL 1311208 (W.D. La. Feb. 5, 2018).

3. Legacy litigation refers to hundreds of lawsuits brought by private landowners seeking damages from oil and gas exploration companies for alleged damage to their property. Loulan Pitre, Jr., “*Legacy Litigation*” and Act 312 of 2006, 20 TUL. ENVTL. L. J. 347, 348 (2007).

4. Kenneth M. Murchison, *Enforcing Environmental Standards Under State Law: The Louisiana Environmental Quality Act*, 57 LA. L. REV. 497, 497–98 (1997); see LA. CONST. art. IX, § 1.

5. LA. CONST. art. IX, § 1.

6. See *id.*; *Guilbeau*, 2019 WL 3801647, at \*2; *Tureau*, 404 F. Supp. 3d at 997.

7. A citizen suit provision is when a private citizen is able to bring a direct suit against one who has violated the law in lieu of the government or its agency initiating the suit. Frank B. Cross, *Rethinking Environmental Citizen Suits*, 8 TEMP. ENVTL. L. & TECH. J. 55, 55–56 (1989).

natural resources.<sup>8</sup> Act No. 157 gives the Commissioner of Conservation (“Commissioner”) the necessary authority to oversee and enforce the environmental regulations of the state.<sup>9</sup> Under this scheme of conservation, Louisiana Revised Statutes sections 30:14 and 30:16 work in tandem to provide legal recourse for violations resulting in environmental damages.<sup>10</sup>

Louisiana Revised Statutes section 30:14 requires the Commissioner to bring suit to restrain an individual “whenever it appears that a person is violating or is threatening to violate a law of this state with respect to the conservation of oil or gas, or both, or a provision of this Chapter, or a rule, regulation, or order made thereunder.”<sup>11</sup> Section 30:14 specifically references illegal acts of moving and disposing of oil and gas products as violations that the Commissioner is tasked with stopping and preventing.<sup>12</sup> Under this regulatory scheme, the Commissioner is responsible for ensuring that Louisiana’s environmental laws and regulations relating to oil and gas development are followed.<sup>13</sup>

If the Commissioner fails to bring a suit against alleged violators, Louisiana Revised Statutes section 30:16 becomes applicable.<sup>14</sup> Under this statute, an adversely affected individual who has previously notified the Commissioner of a violation may themselves bring suit against the violators to “prevent any or further violations” if the Commissioner does not timely file suit.<sup>15</sup> Section 30:16 expressly applies to ongoing and future violations,<sup>16</sup> but the effect of the statute regarding past violations remains uncertain. As such, the language of section 30:16 has raised the issue of exactly what type of violations give rise to a claim. Though a handful of cases have raised the interpretation issue, the question of whether past violations give rise to a valid claim under Louisiana Revised Statutes section 30:16 has not yet been determined.

The Louisiana Supreme Court, through dicta, has implied that private landowners have the right to enforce regulations requiring the clean-up of contaminated property at any time.<sup>17</sup> However, this right, which stems

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8. Act No. 157, 1940 La. Acts 610-629; *Hunter Co. v. McHugh*, 11 So. 2d 495, 496 (La. 1942).

9. *Hunter Co.*, 11 So. 2d at 496.

10. LA. REV. STAT. §§ 30:14, 30:16 (2019).

11. LA. REV. STAT. § 30:14.

12. *Id.*

13. *Id.*

14. *Id.* § 30:16.

15. *Id.*

16. *Id.*

17. *Marin v. Exxon Mobil Corp.*, 48 So. 3d 234, 256 n.18 (La. 2010).

from Louisiana Revised Statutes section 30:16, should not allow a citizen to bring suit against a party who violated the regulation decades ago.<sup>18</sup> Instead, to bring a claim for past environmental damages, the adversely affected party should be required to bring a tort claim against the violator within the one-year prescriptive period, which commences after the landowner knew or should have known of the environmental violation, or within ten years if the contamination arises from a breach of contract.<sup>19</sup>

This Comment will address the worrisome loophole recent litigation has introduced under section 30:16, which potentially allows plaintiffs to circumvent a legislative prescriptive period. To avoid prescription of claims, some plaintiffs use citizen suit provisions as an alternate avenue to maintain legacy litigation claims.<sup>20</sup> This loophole could have troubling implications for future legacy litigation cases, as well as for the future of the oil and gas industry in Louisiana. For these reasons, legacy litigation should not be allowed to be brought under the guise of section 30:16 in order to prevent an action from being barred by a prescriptive period. In fact, the very language of section 30:16 should be read to apply only to ongoing violations and the threat of future violations.

The question that must be addressed is how Louisiana Revised Statutes section 30:16 should be interpreted with regard to past violations. As it stands now, courts in Louisiana avoid issuing rulings on whether section 30:16 applies to past violations in hopes that the Louisiana Supreme Court will rule on the matter.<sup>21</sup> Labeling the violations as “ongoing” provides a means of allowing the lower courts to sidestep making a determination of what the law is with regards to section 30:16.

Forcing lower courts to decide this question of law on their own could “significantly disrupt state efforts to establish a coherent policy for the remediation of contaminated state land.”<sup>22</sup> In order to avoid potential abuse of the statute, the types of violations that create a cause of action under section 30:16 must be determined by the Louisiana Supreme Court.

Part I of this Comment will discuss the first wave of cases to address the citizen suit provision issue, namely *Global Marketing Solutions v. Blue*

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18. *Id.*

19. LA. CIV. CODE art. 3492 (2019); LA. CIV. CODE art. 3493.

20. *Guilbeau v. BEPCO, L.P.*, No. 1:18-cv-551, 2019 WL 3801647 (W.D. La. Aug. 12, 2019); *Tureau v. BEPCO, L.P.*, 404 F. Supp. 3d 993 (W.D. La. 2019); *Watson v. Arkoma Dev., L.L.C.*, No. 17-1331, 2018 WL 1311208 (W.D. La. Feb. 5, 2018); *Global Marketing Sols. v. Blue Mill Farms*, 267 So. 3d 96 (La. Ct. App. 1st Cir. 2018).

21. *Guilbeau*, 2019 WL 3801647; *Tureau*, 404 F. Supp. 3d 993; *Watson*, 2018 WL 1311208; *Global Marketing Sols.*, 267 So. 3d 96.

22. *Guilbeau*, 2019 WL 3801647, at \*7.

*Mill Farms* and *Watson v. Arkoma Development, L.L.C.*<sup>23</sup> Part II will address the second wave of cases from 2019, *Guilbeau v. BEPCO, L.P.* and *Tureau v. BEPCO, L.P.*, taking specific note of the court's understanding of section 30:16 based on the set of 2018 cases and the dynamic issues raised. Part III will provide a brief survey of how federal courts have dealt with past violations of environmental regulations brought as citizen suits. Finally, Part IV will offer a solution to the application of section 30:16, based on the language of the statute and the cases brought after 2018.

## I. BACKGROUND

### A. Legacy Litigation

In Louisiana, legacy litigation is the traditional response to claims of environmental damage wherein a private party is seeking damages from past oil and gas exploration activities.<sup>24</sup> This broad term encapsulates hundreds of cases filed by property owners alleging environmental damage caused by the exploratory actions of oil and gas companies<sup>25</sup> that have left an “unwanted ‘legacy’ in the form of actual or alleged contamination.”<sup>26</sup> These particular types of cases revolve around damage that is often decades old, stemming from actions of the oil and gas companies which have long since ceased.<sup>27</sup> The main objective of legacy litigation is to force the violator to pay for the expensive clean-up of the contaminated land to ensure that the land is remediated to a standard consistent with Louisiana's Constitution.<sup>28</sup>

The United States District Court for the Western District of Louisiana determined that causes of action giving rise to a legacy litigation claim can be tort claims when they are “continuous in nature where each individual act would not necessarily give rise to a cause of action; but instead, the cumulative effect of regularly occurring or continuous actions results in

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23. *Watson*, 2018 WL 1311208; *Global Marketing Sols.*, 267 So.3d 96.

24. *Marin v. Exxon Mobil Corp.*, 48 So. 3d 234, 238 n.1 (La. 2010).

25. *Id.*

26. *Pitre*, *supra* note 3, at 348.

27. *Id.*

28. *Id.* at 349. Even though this objective and ability to force the violator to pay has been heavily litigated and now regulated, for the purposes and scope of this Comment, I am focusing on the citizen suit provisions. Act No. 312, 2006 La. Acts 1472-1483; *Corbello v. Iowa Prod.*, 850 So. 2d 686 (La. 2003).

successive damages from day to day.”<sup>29</sup> Under Louisiana law, delictual legacy lawsuit claims are subject to a one-year prescriptive period.<sup>30</sup> Furthermore, Louisiana Civil Code article 3493 establishes that the prescriptive period for damages caused to an immovable begins to run the day the owner knew, or should have known of the damages.<sup>31</sup> However, depending on the nature of the relationship between the private landowner and the violator, legacy litigation may also be considered a contractual claim.<sup>32</sup> Many legacy litigation cases arise from previous mineral leases.<sup>33</sup> If the claim is found to be contractual in nature, then the claim is subject to a ten year prescriptive period.<sup>34</sup> Regardless of whether the claim is tortious or contractual, the plaintiff landowner is barred from bringing suit once the applicable prescriptive period expires.

In addition to the applicable prescriptive period, legacy litigation claims against oil and gas companies may also be barred by the Subsequent Purchaser Doctrine.<sup>35</sup> It is well established jurisprudence that a person who acquires ownership of the damaged property has no cause of action against the third party for the damage inflicted unless the subsequent purchaser received a subrogation<sup>36</sup> of the rights of the owner at the time the property was damaged.<sup>37</sup> The Louisiana Supreme Court applied the judicially created Subsequent Purchaser Doctrine in *Eagle Pipe and Supply, Inc. v. Amerada Hess*, thereby establishing the effect of this doctrine.<sup>38</sup>

In *Eagle Pipe and Supply*, the Louisiana Supreme Court held that the legal right a person has against another to demand the performance of an obligation is a personal right.<sup>39</sup> While a real right<sup>40</sup> can be asserted against

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29. James v. New Century Mortg. Corp., No. 04-194, 2006 WL 2989242, at \*7 (W.D. La. Oct. 17, 2006).

30. LA. CIV. CODE art. 3492 (2019).

31. *Id.* art. 3493.

32. Marin v. Exxon Mobil Corp., 48 So. 3d 234, 256 (La. 2010).

33. *Id.*

34. LA. CIV. CODE art. 3499.

35. *Eagle Pipe & Supply, Inc. v. Amerada Hess*, 79 So. 3d 246, 256–57 (La. 2011).

36. LA. CIV. CODE art. 1825. Subrogation is the substitution of one person to the rights of another.

37. *Eagle Pipe & Supply*, 79 So. 3d at 256–57; Clark v. J. L. Warner & Co., 6 La. Ann. 408, 409 (1851).

38. *Eagle Pipe & Supply*, 79 So. 3d at 256–57.

39. *Id.* at 261.

40. LA. CIV. CODE art. 476 cmt. b (2019) (“real rights confer direct and immediate authority over a thing”).

anyone, a personal right is effective only between the parties involved.<sup>41</sup> In recognizing the validity of the Subsequent Purchaser Doctrine, the Louisiana Supreme Court effectively restricted the ability of subsequent purchasers to bring legacy litigation claims.<sup>42</sup> However, the owner of the damaged property may still have a claim against the seller, and the third party tortfeasor may still be liable to the prior owner of the damaged property.<sup>43</sup>

### *B. Citizen Suits*

Citizen suits, which became prominent in the 1970s,<sup>44</sup> are actions instituted by private citizens to enforce a statute.<sup>45</sup> A specific subset of citizen suits are environmental citizen suits, whereby private citizens may bring an action directly against the violator if the government or agency fails to bring a timely suit.<sup>46</sup> While the primary purpose of environmental citizen suits is to protect the environment, these suits also help ensure that the law is enforced.<sup>47</sup>

There are two types of environmental citizen suits: (1) an enforcing citizen suit, in which a citizen brings an action directly against a private individual or corporation for alleged environmental violations;<sup>48</sup> and (2) a citizen suit whereby a private citizen sues the governmental agency or official tasked with enforcing the environmental rules and regulations due to their failure to act against violators.<sup>49</sup> The violations recognized under environmental citizen suits are generally limited only to ongoing violations.<sup>50</sup>

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41. *Eagle Pipe & Supply*, 79 So. 3d at 261–62.

42. *Id.*

43. LA. CIV. CODE art. 2315.

44. Jane A. Jackson, *Citizen Suits Under Environmental Statutes: Seeking Guidance for a Recent Louisiana Trend*, 65 ANN. INST. ON MIN. L. 229, 233 (2018).

45. Cross, *supra* note 7, at 55–56.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. STANLEY A. MILLAN et al., LOUISIANA ENVIRONMENTAL COMPLIANCE § 8:9 (2020), Westlaw LAPRAC-ENV.



*C. Louisiana Revised Statutes sections 30:14 and 30:16*

Louisiana Revised Statutes sections 30:14 and 30:16 were enacted in the 1940s, decades before the citizen suit was created.<sup>51</sup> Despite there being no express identification of either statute as a citizen suit provision,<sup>52</sup> the statutes clearly fall into the modern understanding of a citizen suit provision due to their “basic elements: standing, prior notice, and violations.”<sup>53</sup>

Through the enactment of sections 30:14 and 30:16, the legislature specifically created a mechanism for aggrieved property owners alleging an environmental violation.<sup>54</sup> These provisions were enacted to protect Louisiana and its citizens from environmental harm.<sup>55</sup> The Louisiana Office of Conservation (“Office”) is charged with overseeing and enforcing the environmental laws and regulations of the state that relate to oil and gas actions.<sup>56</sup> The Commissioner of Conservation (“Commissioner”) is the head of the Office and, under section 30:14, is the individual tasked with filing suit against violators.<sup>57</sup> The Commissioner must be remiss in his duties under section 30:14 for an aggrieved party to have a claim under section 30:16.<sup>58</sup> When an aggrieved property owner files suit under section 30:16, he or she is effectively stepping into the shoes of the Commissioner.<sup>59</sup>

Under Louisiana Revised Statutes section 30:14, the Commissioner must bring suit to restrain an individual from violating or threatening to violate Louisiana’s oil and gas conservation laws.<sup>60</sup> The suit must be initiated within a ten day period commencing when the Commissioner is notified by the adversely affected party.<sup>61</sup> The Commissioner may seek either a prohibitory or mandatory injunction against the violator.<sup>62</sup> A

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51. Act No. 157, 1940 La. Acts 610-629; Jackson, *supra* note 44, at 233.

52. Jackson, *supra* note 44, at 233.

53. Hunter Co. v. McHugh, 11 So. 2d 495, 496 (La. 1942).

54. Guilbeau v. BEPCO, L.P., No. 1:18-cv-551, 2019 WL 3801647, at \*3 (W.D. La. Aug. 12, 2019); Tureau v. BEPCO, L.P., 404 F. Supp. 3d 993, 997 (W.D. La. Aug. 12, 2019).

55. Cross, *supra* note 7, at 55–56.

56. Guilbeau, 2019 WL 3801647 at \*2; Tureau, 404 F. Supp. 3d at 997.

57. Guilbeau, 2019 WL 3801647 at \*2; Tureau, 404 F. Supp. 3d at 997.

58. Guilbeau, 2019 WL 3801647 at \*2; Tureau, 404 F. Supp. 3d at 997.

59. Guilbeau, 2019 WL 3801647 at \*3; Tureau, 404 F. Supp. 3d at 997.

60. LA. REV. STAT. § 30:14 (2019).

61. *Id.* § 30:16.

62. *Id.* § 30:14.

prohibitory injunction is preventative, restorative, or protective;<sup>63</sup> it is meant to stop an individual from violating or causing harm by creating an order prohibiting the individual from doing so.<sup>64</sup> Alternatively, a mandatory injunction compels the violating party to take action to redress the damages from a violation that has already occurred.<sup>65</sup> When granted based upon a citizen suit provision, mandatory injunctions can be used to require a party to pay clean-up fees.<sup>66</sup>

If the Commissioner fails to bring suit against the violator within ten days of receiving notification of the violation, the landowner adversely affected by the environmental violation(s) may bring suit to stop any current violations, or further violations, under Louisiana Revised Statutes section 30:16.<sup>67</sup> The language of section 30:16 indicates that the statute unequivocally applies to ongoing violations and threats of future violations of conservation regulations, though there is uncertainty regarding its applicability to past violations.<sup>68</sup>

There are few cases involving section 30:16 found in Louisiana jurisprudence.<sup>69</sup> This lack of case law makes the appropriate application of section 30:16 uncertain.<sup>70</sup> While the Louisiana Supreme Court has yet to rule on the issue, the Court has hinted at what types of violations may be addressed through a citizen suit under section 30:16.<sup>71</sup> In a footnote at the end of its opinion in *Marin v. Exxon Mobil Corp.*, the court noted that:

[O]ne of the reasons we granted this writ was to determine whether a subsequent purchaser has the right to sue for property damages that occurred before he purchased the property, particularly where the damage was not overt. However, we need not reach that determination in this case because, assuming the Breauxs had a right as a subsequent purchaser to sue in tort for property damage, that right has prescribed. Further, we note that regardless of who has standing to pursue claims for money damages, the current owner of property always has the right to

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63. Comment, *Injunction—Mandatory Or Prohibitory?*, 25 YALE L.J. 589, 590 (1916).

64. *Id.*

65. *Id.*

66. Rhonda Wasserman, *Equity Transformed: Preliminary Injunctions To Require The Payment Of Money*, 70 B.U. L. REV. 623, 674 (1990).

67. LA. REV. STAT. § 30:16 (2019).

68. *Id.*

69. Jackson, *supra* note 44, at 232.

70. *Id.*

71. *Marin v. Exxon Mobil Corp.*, 48 So. 3d 234, 256 n.18 (La. 2010).

seek a regulatory clean-up of a contaminated site.<sup>72</sup>

The Louisiana Supreme Court treated *Marin v. Exxon Mobil Corp.* as a simple legacy litigation case, finding that the plaintiff's right to bring a delictual claim had prescribed.<sup>73</sup> The Court ultimately abstained from making a decision on whether past violations of conservation regulations would result in a valid claim under section 30:16, but the Court did seem to recognize the right of a private landowner to seek the enforcement of conservation regulations requiring violators to return the land to its previous quality.<sup>74</sup>

However, this recognition is merely dicta.<sup>75</sup> Still, it should be treated as possible insight into how the Louisiana Supreme Court may rule on this issue if or when presented with it in the future.<sup>76</sup>

## II. JURISPRUDENCE

### *A. Novel Use of Louisiana Revised Statutes section 30:16: The First Wave*

#### 1. Global Marketing Solutions v. Blue Mill Farms

*Global Marketing Solutions v. Blue Mill Farms* was originally brought as a legacy litigation suit with the plaintiff asserting tortious and contractual claims against the defendant.<sup>77</sup> The plaintiff ("Global") was a private landowner who filed suit against former mineral lessees whose leases predated his ownership of the land.<sup>78</sup> Global alleged damages from the drilling actions of the defendants. Global was not the owner of the land when the damaging acts allegedly occurred.<sup>79</sup> In fact, Global never even had mineral rights to the property in question as the property became subject to a mineral servitude in the 1930s.<sup>80</sup> The trial court found that the Subsequent Purchaser Doctrine from *Eagle Pipe* clearly barred suit based

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72. *Id.*

73. *Id.* at 262.

74. *Id.* at 256 n.18.

75. *Humphrey's Executor v. United States*, 295 U.S. 602, 627 (1935).

76. *Id.*

77. *Global Marketing Sols. v. Blue Mill Farms*, 267 So. 3d 96, 98 (La. Ct. App. 1st Cir. 2018).

78. *Id.* at 97.

79. *Id.*

80. *Id.*

on legacy litigation grounds, and therefore granted summary judgment in favor of the defendants.<sup>81</sup>

Global then filed a fifth supplemental and amended petition to include sections 30:14 and 30:16.<sup>82</sup> Global sought both prohibitory and mandatory injunctions, alleging that the toxic waste in the soil amounted to environmental violations, including violations of Statewide Order 29-B.<sup>83</sup> Global attached two letters<sup>84</sup> to its petition to show that it properly notified the Commissioner as required by section 30:14, and also to show its intent to file suit against the defendants under section 30:16 if the Commissioner failed to do so.<sup>85</sup>

The Louisiana First Circuit Court of Appeals reversed and remanded the case back to the district court to allow the litigation to proceed under section 30:16.<sup>86</sup> The majority opinion held that the “violations at issue—namely, the failure to remediate the property—[were] still ongoing.”<sup>87</sup>

Concurring with the majority opinion, Judge Holdridge concentrated on the perceived contradiction of sections 30:14 and 30:16.<sup>88</sup> Judge Holdridge stated that the language of the statutes, when read *in pari materia*, is ambiguous and can be seen as authorizing suit for a broader range of violations than explicitly given in section 30:16.<sup>89</sup>

Judge Holdridge did agree with the defendants that the language of section 30:16 only authorizes citizen suits for ongoing or threatened violations.<sup>90</sup> Judge Holdridge stated that there are “other procedural actions available to the parties to more completely address this apparent inconsistency,”<sup>91</sup> such as traditional legacy litigation.<sup>92</sup>

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81. Eagle Pipe and Supply, Inc. v. Amerada Hess, 79 So. 3d 246, 256–57 (La. 2011); *Global Marketing Sols.*, 267 So. 3d at 98.

82. *Global Marketing Sols.*, 267 So. 3d at 98.

83. *Id.* Statewide Order 29-B refers to a subsection of the Louisiana Administrative Code Title 43 that provides general operations guidelines for natural resources from the Office of Conservation. *See* LA. ADMIN. CODE tit. 43, pt. 19, §§ 101–641 (2010).

84. *Global Marketing Sols.*, 267 So. 3d at 98.

85. *Id.*

86. *Id.* at 101.

87. *Id.*

88. *Id.* at 102 (Holdridge, J., concurring).

89. Keith B. Hall & Colleen C. Jarrott, *1st Circuit Allows Legacy Suit to Proceed as Citizen Suit*, 66 LA. B.J. 372, 372–73 (2019).

90. *Global Marketing Sols.*, 267 So. 3d at 102 (Holdridge, J., concurring).

91. *Id.*

92. E-mail from Guy Holdridge, Judge, La. First Circuit Court of Appeal, to author (Oct. 31, 2019) (on file with author).

Judge Guidry dissented from the majority opinion, stating that the plaintiff's allegations were based on wholly past actions and were not appropriate under section 30:16.<sup>93</sup> He noted that the plain meaning of the law did not allow for this type of violation to create a cause of action under section 30:16.<sup>94</sup>

## 2. *Watson v. Arkoma Development, L.L.C.*

In *Watson v. Arkoma Development, L.L.C.*, the defendants' oil and gas exploration and production activities allegedly damaged property belonging to the plaintiff.<sup>95</sup> These exploratory actions commenced in the 1920s.<sup>96</sup> The plaintiff alleged that oil field waste was improperly disposed of in unlined earthen pits<sup>97</sup> leading to the contamination of the land.<sup>98</sup> The defendants filed a motion to dismiss, alleging no cause of action under section 30:16 because the statute does not provide a remedy for past violations.<sup>99</sup>

Magistrate Judge Karen Hayes recommended granting the motion to dismiss most of the plaintiff's claims.<sup>100</sup> She believed that the "Good Samaritan Doctrine"<sup>101</sup> claim should be dismissed due to the plaintiff's

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93. *Global Marketing Sols.*, 267 So. 3d at 101 (Guidry, J., dissenting).

94. *Id.*

95. *Watson v. Arkoma Dev., L.L.C.*, No. 17-1331, 2018 WL 1311208, at \*1 (W.D. La. Feb. 5, 2018).

96. *Id.*

97. Unlined earthen pits are banned in Louisiana by an Amendment to Statewide Order 29-B. *See* Amendment to Statewide Order No. 29-B, 12 La. Reg. 26 (Jan. 20, 1986) (codified at LA. ADMIN. CODE tit. 43, pt. 19).

98. *Watson*, 2018 WL 6274070, at \*1.

99. *Id.*

100. *Id.* at \*2-8 (including the plaintiff's claim under Civil Code article 667, his claim under Civil Code articles 2317 and 2322, his claim under Civil Code article 2688, his claim of unjust enrichment of the defendants, his claim under Act 312, his claim of fraud and his claim of land loss and subsidence damages, all were recommended to be dismissed due to the plaintiff's failure to adequately plead his claims).

101. RESTATEMENT (SECOND) OF TORTS § 324A (AM. LAW INST. 1965). The "Good Samaritan Doctrine" states that:

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect [perform] his undertaking, if

(a) his failure to exercise reasonable care increases the risk of harm, or

failure to plead facts proving that the defendants rendered services to him.<sup>102</sup> She also recommended that the plaintiff's claims of continuing tort and continuing trespass be dismissed, as Global failed to sufficiently plead a theory of either.<sup>103</sup>

Magistrate Judge Hayes did, however, state that the plaintiff's causes of action arising from unauthorized saltwater disposal and injection and breach of express lease terms should be allowed to proceed.<sup>104</sup> She recommended that the defendants' motion to dismiss be denied, as the plaintiff was "alleg[ing] an ongoing violation, not a past violation."<sup>105</sup> Therefore, she believed that the court did not have to determine whether section 30:16 applies to past violations.<sup>106</sup> In doing so, Magistrate Judge Hayes effectively side-stepped the issue and did not attempt to weigh in on this same issue that the Louisiana Supreme Court has yet to address.<sup>107</sup> The district court entered a judgment consistent with the recommendation of Judge Hayes.<sup>108</sup>

### 3. Analysis

In both *Global Marketing Solutions* and *Watson*, the plaintiffs initially attempted to bring suit on more traditional grounds, through simple legacy litigation.<sup>109</sup> Those grounds were barred by the Subsequent Purchaser Doctrine and their respective prescriptive periods.<sup>110</sup> The claims under Louisiana Revised Statutes section 30:16 were a supplemental method of receiving remediation for the alleged environmental damages to the properties.<sup>111</sup> Finding ongoing violations in lieu of finding past violations

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(b) he has undertaken to perform a duty owed by the other to the third person, or

(c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

102. *Watson*, 2018 WL 6274070, at \*2–3.

103. *Id.* at \*4.

104. *Id.* at \*2–10.

105. *Id.* at \*10–11.

106. Hall & Jarrott, *supra* note 89, at 372–73.

107. *Watson*, 2018 WL 6274070, at \*10.

108. Hall & Jarrott, *supra* note 89, at 372–73.

109. *Watson*, 2018 WL 6274070; *Global Marketing Sols. v. Blue Mill Farms*, 267 So. 3d 96 (La. Ct. App. 1st Cir. 2018).

110. *Watson*, 2018 WL 6274070, at \*1; *Global Marketing Sols.*, 267 So. 3d at 98.

111. *Watson*, 2018 WL 6274070, at \*1; *Global Marketing Sols.*, 267 So. 3d at 98.

allowed both courts to avoid having to weigh in on whether section 30:16 is applicable to past violations.<sup>112</sup>

These two cases illustrate the controversies that the language of section 30:16 has created among the jurisprudence. In light of the statute's ambiguous nature, judges have differing opinions on how to interpret the law but seem willing to stretch the law in order to find a result they feel is equitable. Without allowing the suits to be brought under section 30:16, the plaintiffs in both *Global* and *Watson* would have been barred due to strict prescriptive periods and the Subsequent Purchaser Doctrine.

In finding that these past acts constitute an ongoing violation, courts have allowed legacy litigation to go forward under the guise of section 30:16.<sup>113</sup> Since the damages caused by past violations have never been corrected, the courts found the failure to decontaminate the land was an ongoing violation.<sup>114</sup> However, this result does not seem to follow the actual language of the statute, as the contamination is not being continuously done by the defendants. In fact, the actions that caused the damages have long since ceased.<sup>115</sup> The courts are opening the floodgates for litigation under this interpretation of section 30:16. All legacy litigation suits that are otherwise barred by a prescriptive period or the Subsequent Purchaser Doctrine are now viable. Applying the logic behind this ruling, as long as the contaminated land remains in its damaged state, a plaintiff need only allege damages caused by environmental violations, no matter when the violations occurred.

### *B. Novel Use of Louisiana Revised Statutes section 30:16: The Second Wave*

*Guilbeau v. BEPCO, L.P.* and *Tureau v. BEPCO, L.P.* are the two most recent appellate cases brought under Louisiana Revised Statutes section 30:16.<sup>116</sup> While the defendants in both cases are the same parties ("BEPCO"), the plaintiffs are different private landowners who both owned land in the Eola Oil & Gas Field in Avoyelles Parish, Louisiana.<sup>117</sup>

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112. *Watson*, 2018 WL 6274070, at \*10; *Global Marketing Sols.*, 267 So. 3d at 101.

113. Hall & Jarrott, *supra* note 89, at 372–73.

114. *Watson*, 2018 WL 6274070, at \*10; *Global Marketing Sols.*, 267 So. 3d at 101.

115. *Watson*, 2018 WL 6274070, at \*1; *Global Marketing Sols.*, 267 So. 3d at 97.

116. *Guilbeau v. BEPCO, L.P.*, No. 1:18-cv-551, 2019 WL 3801647 (W.D. La. Aug. 12, 2019); *Tureau v. BEPCO, L.P.*, 404 F. Supp. 3d 993 (W.D. La. 2019).

117. *Guilbeau*, 2019 WL 3801647, at \*1; *Tureau*, 404 F. Supp. 3d at 994.

These two cases illustrate the issues courts are having in determining whether past violations create a claim under the statute. Both opinions were delivered on the same day in the U.S. District Court for the Western District of Louisiana by Judge Dee Drell.<sup>118</sup> The majority opinions are identical.<sup>119</sup>

### *1. Factual History*

*Guilbeau* and *Tureau* are legacy litigation cases wherein the plaintiffs sought an injunction against the defendants for alleged contamination to their property caused by previous oil and gas exploration.<sup>120</sup> In both cases, the plaintiffs alleged that BEPCO drilled on adjacent land and caused contamination from BEPCO's oil and gas wells.<sup>121</sup> The plaintiffs also alleged that the defendants left unlined earthen pits<sup>122</sup> that were either not closed at all, or were not closed properly in compliance with Statewide Order 29-B.<sup>123</sup>

On August 31, 2016, both plaintiffs alerted the Commissioner about the violations and requested that he file suit under section 30:14.<sup>124</sup> The plaintiffs then sent a follow-up letter to the Commissioner dated September 27, 2016, indicating their intent to file suit under section 30:16 if the Commissioner failed to file suit.<sup>125</sup>

Ultimately, the Commissioner did not file suit under section 30:14 within the allotted period.<sup>126</sup> In response, *Tureau* filed suit under section 30:16 on September 14, 2017, and *Guilbeau* on September 15, 2017.<sup>127</sup> In both cases, the defendants filed a Rule 12(b)(6)<sup>128</sup> motion to dismiss.<sup>129</sup> Magistrate Judge Perez-Montes recommended that the defendants' Motions to Dismiss both be denied.<sup>130</sup>

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118. *Guilbeau*, 2019 WL 3801647; *Tureau*, 404 F. Supp. 3d 993.

119. *Guilbeau*, 2019 WL 3801647; *Tureau*, 404 F. Supp. 3d 993.

120. *Guilbeau*, 2019 WL 3801647, at \*1; *Tureau*, 404 F. Supp. 3d at 994.

121. *Guilbeau*, 2019 WL 3801647, at \*1; *Tureau*, 404 F. Supp. 3d at 994.

122. Unlined earthen pits are banned in Louisiana by an Amendment to Statewide Order 29-B. *See* Amendment to Statewide Order No. 29-B, 12 La. Reg. 26 (Jan. 20, 1986) (codified at LA. ADMIN. CODE tit. 43, pt. 19).

123. *Guilbeau*, 2019 WL 3801647, at \*1; *Tureau*, 404 F. Supp. 3d at 994.

124. *Guilbeau*, 2019 WL 3801647, at \*1; *Tureau*, 404 F. Supp. 3d at 994.

125. *Guilbeau*, 2019 WL 3801647, at \*1; *Tureau*, 404 F. Supp. 3d at 994.

126. *Guilbeau*, 2019 WL 3801647, at \*1; *Tureau*, 404 F. Supp. 3d at 994.

127. *Guilbeau*, 2019 WL 3801647, at \*1; *Tureau*, 404 F. Supp. 3d at 995.

128. This is a motion to dismiss based on a failure to state a claim upon which relief can be granted. FED. R. CIV. P. 12(b)(6).

129. *Guilbeau*, 2019 WL 3801647, at \*2; *Tureau*, 404 F. Supp. 3d at 995.

130. *Guilbeau*, 2019 WL 3801647, at \*2; *Tureau*, 404 F. Supp. 3d at 995.



The emergence of using section 30:16 to bring suit for past violations is a relatively new development in Louisiana.<sup>131</sup> Litigators are attempting to bring legacy litigation suits that are otherwise barred.<sup>132</sup> This attempt to bring legacy litigation under section 30:16 is in response to the heavy limitation on legacy litigation implemented by *Marin v. Exxon Mobil Corp.* and *Eagle Pipe & Supply, Inc. v. Amerada Hess Corp.*<sup>133</sup> Judge Drell stated that plaintiffs have now begun “recalibrating their efforts” in an attempt to save the viability of legacy litigation suits.<sup>134</sup> For this reason, *Global Marketing Solutions* and *Watson* are hailed as the “new wave of litigation” following this new trend.<sup>135</sup>

In both *Tureau* and *Guilbeau*, a section 30:16 claim was only asserted after the plaintiffs’ legacy litigation cases were dismissed.<sup>136</sup> Judge Drell examined the rationale of the decision from the first wave of this novel use of the citizen suit and its expansion of section 30:16.<sup>137</sup> However, after much analysis, the BEPCO decisions still avoided actually deciding whether this was the correct conclusion.<sup>138</sup>

## 2. Reasoning of the Court

In both cases, the court abstained—under the Burford Doctrine<sup>139</sup>—from making a decision on whether Louisiana Revised Statutes section

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131. See *Guilbeau*, 2019 WL 3801647; *Tureau*, 404 F. Supp. 3d 993; *Watson v. Arkoma Dev., L.L.C.*, No. 17-1331, 2018 WL 1311208 (W.D. La. Feb. 5, 2018); *Global Marketing Sols. v. Blue Mill Farms*, 267 So. 3d 96 (La. Ct. App. 1st Cir. 2018).

132. *Guilbeau*, 2019 WL 3801647, at \*3; *Tureau*, 404 F. Supp. 3d at 998.

133. *Guilbeau*, 2019 WL 3801647, at \*3; *Tureau*, 404 F. Supp. 3d at 998.

134. *Guilbeau*, 2019 WL 3801647, at \*4; *Tureau*, 404 F. Supp. 3d at 998.

135. *Guilbeau*, 2019 WL 3801647, at \*4; *Tureau*, 404 F. Supp. 3d at 998–1000.

136. *Guilbeau*, 2019 WL 3801647, at \*4; *Tureau*, 404 F. Supp. 3d at 998.

137. *Guilbeau*, 2019 WL 3801647, at \*4; *Tureau*, 404 F. Supp. 3d at 998.

138. *Guilbeau*, 2019 WL 3801647, at \*6; *Tureau*, 404 F. Supp. 3d at 1000.

139. Burford Doctrine: Where timely and adequate state-court review is available, a federal court sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies: (1) when there are “difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar”; or (2) where the “exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.” *Burford v. Sun Oil Co.*, 319 U.S. 315, 318 (1943).

30:16 is applicable to past violations.<sup>140</sup> The court gave a detailed reasoning for its decision to abstain.<sup>141</sup>

The court held that while the Louisiana Supreme Court is the only Louisiana court able to determine the correct interpretation of the law, it has yet to rule on the issue, thereby leaving it open for other courts to attempt to interpret the law.<sup>142</sup> Though there have been decisions from the First Circuit Court of Appeals, those decisions are not binding on other courts of equal or greater rank.<sup>143</sup>

The only indication of how the Louisiana Supreme Court would possibly rule comes from a footnote in *Marin*,<sup>144</sup> but this footnote is merely dicta.<sup>145</sup> The court reasoned that since there is no ruling from the Louisiana Supreme Court on the “novel use of the statute,” the court must attempt an *Erie* guess.<sup>146</sup> Therefore, under the Burford Doctrine, the court decided to abstain from interpreting the statute as it is too entangled in the issue of state policy and the public welfare.<sup>147</sup>

### 3. Analysis

The *BEPCO* cases laid out the State’s interests in having the interpretation of Louisiana Revised Statutes section 30:16 settled by the Louisiana Supreme Court: (1) the future of the oil and gas industry; and (2) the future of legacy litigation.<sup>148</sup> These State interests make the statute’s applicability an important unanswered question. If section 30:16 is found to apply to past violations, it may potentially undo the limitations on oil and gas legacy suits previously implemented by the Louisiana Supreme Court, such as the Subsequent Purchaser Doctrine.<sup>149</sup>

The U.S. District Court for the Western District of Louisiana recognized that section 30:16 has been used in this new context only after

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140. *Guilbeau*, 2019 WL 3801647, at \*8; *Tureau*, 404 F. Supp. 3d at 1000.

141. *Guilbeau*, 2019 WL 3801647, at \*2–8; *Tureau*, 404 F. Supp. 3d at 996–1002.

142. *Guilbeau*, 2019 WL 3801647, at \*8; *Tureau*, 404 F. Supp. 3d at 1002.

143. *Guilbeau*, 2019 WL 3801647, at \*6; *Tureau*, 404 F. Supp. 3d at 1000.

144. *Marin v. Exxon Mobil Corp.*, 48 So. 3d 234, 256 n.18 (La. 2010).

145. *Guilbeau*, 2019 WL 3801647, at \*6; *Tureau*, 404 F. Supp. 3d at 1000.

146. *Guilbeau*, 2019 WL 3801647, at \*6; *Tureau*, 404 F. Supp. 3d at 1000. An *Erie* guess refers to a federal court making an educated determination of how it believes that the applicable state’s highest court would resolve the issue if presented with it. *See American Int’l Specialty Lines Ins. Co. v. Canal Indem. Co.*, 352 F.3d 254, 260 (5th Cir. 2003).

147. *Guilbeau*, 2019 WL 3801647, at \*6; *Tureau*, 404 F. Supp. 3d at 1001–02.

148. *Guilbeau*, 2019 WL 3801647, at \*8; *Tureau*, 404 F. Supp. 3d at 1001–02.

149. *Guilbeau*, 2019 WL 3801647, at \*8; *Tureau*, 404 F. Supp. 3d at 1002.

previous legacy litigation claims failed.<sup>150</sup> The court's acknowledgement of this fact indicates that the guise under which legacy litigation masquerades as a citizen suit is flimsy at best. The violations were referred to as "present-day contamination caused by those historical activities"<sup>151</sup> by the *BEPCO* court, indicating that it views them as wholly past violations, unlike the courts in *Global Marketing Solutions* and *Watson*, who found failures to remediate constitute ongoing violations.<sup>152</sup> This fact alone furthers the worrisome nature of allowing legacy litigation claims to be brought under section 30:16 as it is a blatant attempt to manipulate the legal system to benefit individuals who otherwise do not have a claim.

The Western District's concern that if section 30:16 does not apply to past violations, the state's interest in protecting the environment could be harmed, is easily mitigated.<sup>153</sup> Future and ongoing violations would still be able to be litigated under the statute. As long as suits are timely filed, Louisiana's interest in protecting the environment will not be adversely affected by prescriptive periods. The importance of coherence of state policy furthers the need for a clear determination of whether this statute applies to past violations.<sup>154</sup> This leaves an unanswered question that could potentially impact the state and its environmental interests.

### III. FEDERAL TREATMENT OF ENVIRONMENTAL CITIZEN SUITS

Federal treatment of environmental citizen suits is highly influenced by *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*<sup>155</sup> Prior to *Gwaltney*, many federal courts, but not all, allowed suits to be brought for past violations.<sup>156</sup> This dichotomy led to a split among the

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150. *Guilbeau*, 2019 WL 3801647, at \*4; *Tureau*, 404 F. Supp. 3d at 997.

151. *Guilbeau*, 2019 WL 3801647, at \*1; *Tureau*, 404 F. Supp. 3d at 995.

152. *Watson v. Arkoma Dev., L.L.C.*, No. 17-1331, 2018 WL 1311208, at \*10-11 (W.D. La. Feb. 5, 2018); *Global Marketing Sols. v. Blue Mill Farms*, 267 So. 3d 96, 101 (La. Ct. App. 1st Cir. 2018).

153. *Guilbeau*, 2019 WL 3801647, at \*8; *Tureau*, 404 F. Supp. 3d at 1002.

154. *Guilbeau*, 2019 WL 3801647, at \*6; *Tureau*, 404 F. Supp. 3d at 1001.

155. Jeffrey G. Miller, *Theme and Variations in Statutory Preclusions Against Successive Environmental Enforcement Actions by EPA And Citizens – Part One: Statutory Bars in Citizen Suit Provisions*, 28 HARV. ENVTL. L. REV. 401, 491 (2004).

156. See *Hamker v. Diamond Shamrock Chemical Co.*, 756 F.2d 392, 396 (5th Cir. 1985); *City of Evansville v. Kentucky Liquid Recycling*, 604 F.2d 1008, 1014 (7th Cir. 1979); see also *Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield, Ltd.*, 791 F.2d 304 (4th Cir. 1986), *vacated and remanded*, 484 U.S. 49 (1987); *Atlantic States Legal Found. v. Al Tech Specialty Steel Corp.*, 635 F. Supp. 284 (N.D.N.Y. 1986); *Connecticut Fund for the Env't v. Job Plating Co.*, 623 F. Supp.

district courts on the issue, resulting in confusion for individuals wanting to file suit against a violator.<sup>157</sup> *Gwaltney* became the seminal case for a narrow interpretation of citizen suit provisions and has since been used to interpret other environmental citizen suit provisions.<sup>158</sup> *Gwaltney* set the standard for how to treat past violations when the language of the statute only explicitly mentions ongoing violations of environmental laws or regulations.<sup>159</sup>

### A. Background

*Gwaltney* dealt with a federal environmental citizen suit provision contained in the Clean Water Act (“CWA”).<sup>160</sup> Specifically, the case discussed whether past violations gave rise to a cause of action under the CWA.<sup>161</sup> The defendant allegedly violated the CWA by exceeding the effluent limitations on pollutants numerous times.<sup>162</sup> The last violation occurred almost two years prior to when the plaintiff filed suit.<sup>163</sup> The defendant moved for dismissal, arguing that the violations were wholly past violations and as such, did not fall within the scope of the CWA.<sup>164</sup> The district and appellate court both found in favor of the plaintiff, concluding that section 505 of the CWA did in fact allow for suit to be brought for wholly past violations of the Act.<sup>165</sup>

Upon granting writs, the United States Supreme Court held that the best way to determine the meaning of section 505 was to look to the

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207 (D. Conn. 1985); *SPIRG of N.J. v. Georgia-Pacific Corp.*, 615 F. Supp. 1419 (D.N.J. 1985); Cross, *supra* note 7, at 63.

157. Miller, *supra* note 155, at 491.

158. Cross, *supra* note 7, at 63; Miller, *supra* note 155, at 491; *see also* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83 (1998); *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); *Lujan v. Nat'l Wildlife Fed.*, 497 U.S. 871 (1990).

159. Cross, *supra* note 7, at 63; Miller, *supra* note 155, at 491.

160. The Clean Water Act (“CWA”) was enacted to “to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.” 33 U.S.C. §§ 1250–1387 (2018).

161. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 53–54 (1987). Clean Water Act § 505(a) states in part that a private citizen may bring suit “against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation.” 33 U.S.C. § 1365(a) (2018).

162. *Gwaltney of Smithfield*, 484 U.S. at 53.

163. *Id.* at 54.

164. *Id.* at 55.

165. *Id.* at 56.

language of the statute itself, which was determined to mean only ongoing and future violations.<sup>166</sup> In applying this meaning, the Court held that in order to bring a citizen suit under section 505, the plaintiff must “allege a state of either continuous or intermittent violation—that is, a reasonable likelihood that a past polluter will continue to pollute in the future.”<sup>167</sup>

The Court rejected the plaintiffs’ claims that the “to be in violation” language of section 505 of the CWA signaled that past violations were included in the types of violations that triggered the ability to bring suit.<sup>168</sup> The Court worried that allowing citizen suits for wholly past violations would undermine the Administrator’s enforcement discretion and could become potentially intrusive.<sup>169</sup> The Court felt that this interpretation would not be in line with the intent of Congress, as it would disrupt the “supplementary role” of citizen suits.<sup>170</sup> The Court concluded that if Congress had intended such an interpretation, the language of section 505 would specifically include past violations.<sup>171</sup>

After *Gwaltney*, the bar remained relatively low to be able to bring a citizen suit—litigants were only required to show, in good faith, that a recurrence of the violation was likely.<sup>172</sup> Likewise, in order to defeat the claim, “the defendant [had to] demonstrate that it [was] absolutely clear that the alleged wrongful behavior could not reasonably be expected to recur.”<sup>173</sup>

In 1990, Congress amended section 505 to include the phrase “who is alleged to have violated,” thereby specifically including past violations under the scope of the statute and allowing for the payment of the clean-up costs.<sup>174</sup>

### B. Analysis

The Court took a conservative approach in its interpretation of the CWA, and such an analysis indicates the Court’s desire to show deference to the acts of Congress.<sup>175</sup> The Court’s employment of a plain reading of

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166. *Id.* at 57.

167. *Id.*

168. *Id.*

169. *Id.* at 60–61.

170. *Id.*

171. *Id.*

172. Cross, *supra* note 7, at 63.

173. *Gwaltney of Smithfield*, 484 U.S. at 66 (quoting *United States v. Phosphate Export Ass’n, Inc.*, 393 U.S. 199, 203 (1968) (emphasis in *Gwaltney*)).

174. 42 U.S.C. § 7604(a)(1) (2018).

175. *Gwaltney of Smithfield*, 484 U.S. at 60–61.

the text led to the conclusion that past violations do not give a rise to a cause of action under the CWA, and that this must be the result that Congress intended due to the language.<sup>176</sup>

The later amendment of the CWA after *Gwaltney* clearly indicated the intent of Congress to include wholly past violations within the scope of the statute.<sup>177</sup> With this amendment, the interpretation by the Supreme Court seems even more compelling. The alteration of the statute to include past violations gives weight to the argument of following the plain meaning of a statute unless there is Congressional direction otherwise. In following the plain meaning, the Court refused to overextend its power by too broadly interpreting the intent of Congress. Congress has the power, at any time, to alter the language of a statute to explicitly state the result Congress desires. While even the highest Court can only rule on what the law is in front of it, Congress can ultimately supersede the Court's understanding of a statute by updating the statute's language, which is exactly what Congress did.

The Court's reasoning in *Gwaltney* is applicable when determining how to interpret Louisiana Revised Statutes section 30:16 because the statute does not specifically mention applying to past violations, just as Section 505 of the CWA did not expressly provide for past violations in *Gwaltney*. For this reason, it must be inferred that the legislature intended the statute to be read as written. If the legislature intended a different result, the legislature has the sole authority to amend the statute at any time to include past violations.

#### IV. PROPOSED APPLICATION OF LOUISIANA REVISED STATUTES SECTION 30:16

This Comment proposes that Louisiana Revised Statutes section 30:16 should only apply to ongoing and future violations. There are three major factors in this consideration: (1) the language of section 30:16; (2) the purpose of prescriptive periods and judicially created bars to suit; and (3) the alternative remedies available under section 30:16.

##### *A. Language of Louisiana Revised Statutes section 30:16*

As the Court explained in *Gwaltney*, the explicit language of any statute is the most logical place to start when discerning how to properly apply the law.<sup>178</sup> Statutes are the expression of legislative will and as such,

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176. *Id.*

177. 33 U.S.C. § 1365.

178. *Gwaltney of Smithfield*, 484 U.S. at 57.

the language should reflect legislative intent.<sup>179</sup> The text of Louisiana Revised Statutes section 30:16 does not explicitly provide for the inclusion of past violations as a means to bring suit under the statute.<sup>180</sup> Instead, ongoing and future violations are the only types of violations specifically mentioned in section 30:16.<sup>181</sup> It is not the inclusion of ongoing and future violations in the language of section 30:16, but the exclusion of past violations from this language that speaks volumes. If the legislature intended for section 30:16 to apply to past violations, the language of the statute would indicate that by adding the phrase, “past violations.” It should be assumed that the legislature was careful in its wording of section 30:16, and was intentional with the words chosen.<sup>182</sup>

If the language of section 30:16 is found to be ambiguous by a court, Louisiana Civil Code articles 10 and 11 will apply.<sup>183</sup> Louisiana Civil Code article 10 states that when the language of a statute is susceptible to numerous meanings, the statute should be interpreted in the way that best conforms to the purpose of the statute.<sup>184</sup> Furthermore, Louisiana Civil Code article 11 provides that when the language of the statute is unclear, the language of the statute should be given its general meaning.<sup>185</sup> Section 30:16 works in tandem with section 30:14 to protect the environment.<sup>186</sup> These statutes seek to prevent violations of Louisiana’s environmental laws and regulations.<sup>187</sup> Therefore, because the purpose of section 30:16 is to be preventative, ongoing and future violations should be the only violations applicable under the statute. To extend the statute’s application to a wholly past violation would not serve the preventative purpose of section 30:16.

Section 30:16 expressly provides that ongoing and future violations trigger a right to bring suit, making no mention at all of wholly past violations.<sup>188</sup> Applying Louisiana Civil Code article 11, the two expressly provided types of violations are the only ones that are to be included in the scope of the statute.

It can also be argued that the language of the statute is not ambiguous. Under Louisiana Civil Code article 9, if “a law is clear and unambiguous

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179. LA. CIV. CODE art. 2 (2019).

180. LA. REV. STAT. § 30:16 (2019).

181. *Id.*

182. LA. CIV. CODE art. 2.

183. *Id.* arts. 10–11.

184. *Id.* art. 10.

185. *Id.* art. 11.

186. LA. REV. STAT. §§ 30:14, 30:16 (2019).

187. LA. REV. STAT. §§ 30:14, 30:16.

188. LA. REV. STAT. § 30:16.

and its application does not lead to absurd consequences, the law shall be applied as written and no further interpretation may be made in search of the intent of the legislature.”<sup>189</sup> Using this standard, the language of the statute would not permit retroactive application, but instead would only allow for current and prospective application as the statute only expressly provides for future and ongoing violations.<sup>190</sup>

There are also arguments that can be made that a literal reading is not the most appropriate way to interpret the section 30:16. While the legislature may want to allow people to bring a claim against those that have damaged the land of private property owners, this avenue has already been limited by the relevant prescriptive periods and the Subsequent Purchaser Doctrine.<sup>191</sup> However, the legislature has the ability, at any time, to change the legislation to reflect an intent to allow claims for past violations. *Gwaltney* is a perfect example of how this can and should work, especially considering the similarities between the question of whether either statute applies to past violations, though neither expressly provides for that application in the language of the statute. Therefore, a literal reading of the statute seems to be the most prudent way to determine its meaning.

The statute’s present tense is another factor that supports this proposed application.<sup>192</sup> Section 30:16 is written solely in the present tense, indicating that it is merely meant to be a preventative or a corrective measure for future and ongoing violations.<sup>193</sup> The statute provides an aggrieved landowner the ability to bring suit to “prevent any or further violations.”<sup>194</sup> This is indicative that only ongoing and future violations were contemplated when this statute was enacted.<sup>195</sup>

#### *B. Purpose of Prescriptive Periods and Judicially Created Bars to Suit*

The four Louisiana cases previously discussed in this Comment have each sought to take advantage of what is essentially a loophole under section 30:16. Without a broad interpretation of section 30:16, these cases

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189. LA. CIV. CODE art. 9.

190. *Id.*

191. *Id.* arts. 3492–93; *Eagle Pipe and Supply, Inc. v. Amerada Hess*, 79 So. 3d 246, 256–57 (La. 2011).

192. LA. REV. STAT. § 30:16.

193. *Id.*

194. *Id.*

195. LA. CIV. CODE art. 9.



would not have been viable.<sup>196</sup> Each claim would have been barred, either due to the respective prescriptive periods or the Subsequent Purchaser Doctrine.<sup>197</sup> *Global Marketing Solutions* and *Watson* were not even originally brought under section 30:16, but rather were brought as legacy litigation claims that were ultimately barred for the aforementioned reasons.<sup>198</sup>

In creating a means to evade prescriptive periods, section 30:16 causes injustice. Prescriptive periods provide a finite amount of time within which a case must be brought.<sup>199</sup> This period of time is intended to represent a reasonable amount of time for both the plaintiff and the defendant.<sup>200</sup> The purpose of a prescriptive period is to allow for a fair and level playing field so that a defendant is not surprised by suit years after an injury occurs.<sup>201</sup> Furthermore, if a claim is allowed to be brought a significant time later, the evidence that a defendant might need to defeat the allegation may no longer be available or reliable.<sup>202</sup> A plaintiff with a valid claim is expected to pursue that claim with reasonable diligence.<sup>203</sup> Prescriptive periods prevent stale claims from being brought and help to protect from inequitable results.<sup>204</sup>

Additionally, the Subsequent Purchaser Doctrine is a judicially created bar to filing suit that has greatly impacted legacy litigation.<sup>205</sup> By enacting this doctrine, the Louisiana Supreme Court greatly narrowed the scope of legacy litigation.<sup>206</sup> The introduction of the requirement of assignment or subrogation of the rights of the previous owner into legacy litigation was a purposeful move by the Court to provide protection to third parties accused of contaminating land years ago and to prevent the unjust

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196. *Guilbeau v. BEPCO, L.P.*, No. 1:18-cv-551, 2019 WL 3801647 (W.D. La. Aug. 12, 2019); *Tureau v. BEPCO, L.P.*, 404 F. Supp. 3d 993 (W.D. La. 2019); *Watson v. Arkoma Dev., L.L.C.*, No. 17-1331, 2018 WL 1311208 (W.D. La. Feb. 5, 2018); *Global Marketing Sols. v. Blue Mill Farms*, 267 So. 3d 96 (La. Ct. App. 1st Cir. 2018).

197. *Guilbeau*, 2019 WL 3801647; *Tureau*, 404 F. Supp. 3d 993; *Watson*, 2018 WL 1311208; *Global Marketing Sols.*, 267 So. 3d 96.

198. *Watson*, 2018 WL 1311208, at \*1; *Global Marketing Sols.*, 267 So. 3d at 98.

199. FRANK L. MARAIST ET AL., *TORT LAW—THE AMERICAN AND LOUISIANA PERSPECTIVES* 355 (3rd ed. 2017).

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.*

205. *Eagle Pipe & Supply, Inc. v. Amerada Hess*, 79 So.3d 246, 256–57 (La. 2011).

206. *Id.* at 261–62.

enrichment of the plaintiff.<sup>207</sup> As the Louisiana Supreme Court expressed in *Eagle Pipe*, “the law does not provide to the Subsequent Purchaser a source of profit by allowing him to negotiate a low purchase price based on the condition of the property and the right to seek damages from the tortfeasor who is responsible for the property's poor condition.”<sup>208</sup>

Allowing these tort and breach of contract claims to be brought under a statute meant to serve Louisiana’s interest in conservation undermines the very purpose of having prescriptive periods and other judicially created means of barring suit.<sup>209</sup> By broadly interpreting section 30:16 to include past violations, numerous legacy litigation claims that are barred by prescriptive periods or the Subsequent Purchaser Doctrine will now be viable. This result is in direct contradiction to the purpose of having these bars to begin with and will open the floodgates of litigation.

### *C. Applicability of Remedies Available Under Louisiana Revised Statutes section 30:16*

There are two remedies available to plaintiffs under Louisiana Revised Statutes section 30:16: prohibitory injunctions and mandatory injunctions.<sup>210</sup> However, a prohibitory injunction is not appropriate for past violations, because the only remedy for this type of injunction is an order to an individual to not do something in the future.<sup>211</sup> As such, the preventative nature of prohibitory injunctions offers no relief for past violations that have damaged property. Additionally, mandatory injunctions should not be applicable to past violations either, due to the intent behind the Subsequent Purchaser Doctrine.

Issuing a mandatory injunction for past violations would essentially order the past violator to pay the expensive fees for the cleanup of the contaminated land. Allowing a past violation to give rise to a cause of action under section 30:16 would authorize a plaintiff to sue a violator for an act that took place prior to the plaintiff’s acquisition of the land.<sup>212</sup> This would mean that the plaintiff would have only owned the land in its contaminated state, and therefore, the current landowner would be “restored” to a situation that they had never had previously, giving them an unexpected windfall. The inequity in issuing mandatory injunctions for past violations under section 30:16 cannot be denied. It would be against

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207. *Id.*

208. *Id.* at 276.

209. *Id.* at 261–62; MARAIST ET AL., *supra* note 199, at 355.

210. LA. REV. STAT. § 30:16 (2019).

211. Comment, *supra* note 63, at 590.

212. *Eagle Pipe & Supply*, 79 So. 3d at 276.

public policy to allow a plaintiff to be unduly enriched by buying contaminated land cheaply and then forcing the violator to pay for the cleanup of their past violations, thereby unjustly enriching the buyer. This would be in direct violation of the intent behind the Subsequent Purchaser Doctrine.<sup>213</sup>

The inappropriateness of these two remedies applying to past violations under section 30:16 further strengthens the argument that past violations should not be allowed under the statute.

#### CONCLUSION

A fair reading of Louisiana Revised Statutes section 30:16, combined with the underlying purpose of prescriptive periods and the Subsequent Purchaser Doctrine, supports the determination that section 30:16 applies only to future and ongoing violations, and does not apply to past environmental violations. The new trend of bringing legacy litigation under section 30:16 is merely a means to circumvent prescriptive periods and the Subsequent Purchaser Doctrine. The uncertainty among lower courts on how to interpret the statute necessitates either a ruling from the Louisiana Supreme Court interpreting the law or an amendment by the legislature to clarify its intent. If the Louisiana Legislature fails to make this clarification, then if, and when, the Louisiana Supreme Court is presented with this issue, the Court should determine that the rights provided under the statute do not extend to past violations of environmental laws and regulations.

*Ashleigh Adams\**

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213. *See id.*

\* J.D./D.C.L., 2021, Paul M. Hebert Law Center, Louisiana State University. The author extends her gratitude to Professor Keith Hall for his time, guidance, and insight into the writing process. Additionally, she is grateful to the JELR Volume VIII and IX Editorial Boards for their thoughtful edits and contributions during the production process.